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No. 89-1007

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN T. OXLEY,
Petitioner

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation, by and through the TULSA AIRPORT AUTHORITY,
Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

BRIEF OF RESPONDENT

J. RICHARD STUDENNY & ASSOCIATES
1924 S. Utica, Suite 1200
Tulsa, OK 74104
(918) 747-3611
Counsel for Respondent

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Cone-Lewis Printing Co. • 16 N. College • Tulsa, OK 74110 • Phone (918) 832-8886

QUESTION PRESENTED FOR REVIEW

Whether a state court verdict supported by the law and the evidence, which was rendered by a jury considering all facts urged by a petitioner and considering jury instructions that were not objected to by a petitioner, presents a special or important reason for granting a writ of certiorari.

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OPINION BELOW

The opinion of the Supreme Court of Oklahoma rendered March 28, 1989, is reprinted in the Appendix to the petitioner's petition for writ of certiorari at Page A1.

STATEMENT OF JURISDICTION

The jurisdiction of the Court has been invoked by the petitioner under Title 28, United States Code, Sections 1257(3) and

2101(c) (1982). The opinion of the Supreme Court of Oklahoma was rendered on March 28, 1989. The petitioner's request for rehearing was denied on September 21, 1989.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides (U.S. CONST. amend. V):

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section one of the Fourteenth Amendment to the United States Constitution provides (U.S. CONST. amend. XIV, §1):

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Article II, section 7, of the Constitution of the State of Oklahoma provides (OKLA. CONST. art. II, §7):

No person shall be deprived of life, liberty or property, without due process of law.

4. Article II, section 24, of the Constitution of the State of Oklahoma provides (OKLA. CONST. art. II, §24):

Private property shall not be taken or damaged for public use without just compensation . . .

STATEMENT OF THE CASE

This case arises out of the District Court in and for Tulsa County, Oklahoma. The petitioner, John Oxley, was the plaintiff in the trial court and the appellant in the Oklahoma Supreme Court. The respondent, the City of Tulsa, Oklahoma by and through the Tulsa Airport Authority, was the defendant and the appellee respectively below. The parties will be referred to in this brief as "Oxley," the "City of Tulsa," and the "Airport Authority." The respondent is constrained to restate the case and facts since the petitioner's presentation contains inaccuracies and statements that are not supported by the record.

The following symbols shall be employed:

1. "TR" for Transcript of Record;

2. "PX" for Plaintiff's Exhibit; and

3. "DX" for Defendant's Exhibit.

Purchase of property next to the expanding Airport—Historical Summary.

In 1973 Oxley moved from a 60 acre tract of land which he owned in Tulsa, Oklahoma. (TR. 107.) Oxley moved from the property for one reason: Aircraft noise originating from his neighbor's land had made the property unsuitable for residential use and for raising horses; his neighbor was Tulsa International Airport ("Airport"). (TR. 97, 100.) For years, the noise

from the Airport had interfered with Oxley's use of the property for residential purposes. (TR. 105, 106, 123, 124 and 305.) In fact when Oxley first moved to the property in 1951, the residential use was chronically interfered with as a result of noise from overflights of large military aircraft from the Douglas bomber factory. The bomber factory had been located to the southeast of the 60 acre tract of land since World War II. The runway from the bomber factory pointed right to the Oxley property and the extremely noisy military aircraft (such as the large four-engine stratojet bomber) took off and landed through airspace adjacent to Oxley's property. (TR. 103, 410, 411, 412 and 413.) Later, in 1952, the east runway at the Airport was extended to its present length of 10,000 feet. With the runway extension in 1952, the entire east side of the Oxley property was parallel to the main, east runway. (TR. 100 and 104.)

In addition to large military aircraft operations, commercial aircraft began utilizing the east runway in the early 1960's. (TR. 104, 105 and 124.) In 1961 Taxiway Alpha was extended parallel to the full length of the west side of the east runway. (TR. 505.) The military jet aircraft using the runway in the late 1950's and 1960's were as noisy as military aircraft now operating at the Airport, and the commercial jet aircraft operating in the 1960's were much noisier than the new generation aircraft now operating at the Airport. (TR. 412, 789, 791 and 792.)

By the late 1960's, the Airport-related noise had become unbearable to the Oxleys. (TR. 105 and 124.) In fact, as early as 1968, residential use of the Oxley property was incompatible with noise levels produced at the Airport. (TR. 792, 812, 813, 831, 832, 834 and 835.) Because of the significant noise levels, Oxley repeatedly approached the Tulsa Airport Authority (the agency of the City of Tulsa charged with the operation of the

Airport) and asked that his property be purchased. (TR. 175, 177, 179, 199 and 201.) The Airport Authority desired to comply with his repeated requests, but Oxley and the Airport Authority were never able to agree upon a price. (TR. 1179.)

Oxley moved from the property, but continued to use it for rental income purposes.

In 1973 Oxley moved from the 60 acre tract of land to a 6,000 acre ranch about five (5) miles northeast of the Airport. (TR. 134, 135 and 137.) Thereafter he rented the houses on the 60 acre tract of land to, as Oxley stated at trial, "some poor people." (TR. 108.) Even though Oxley received as much as $1,900.00 per month in rentals from the residential occupants (DX 1), it was his opinion that after 1973 the highest and best use of the 60 acres was not for residential use, but for light industrial, commercial development. (TR. 148.)

The Airport Authority conducted a noise study and determined that residential use of the property was incompatible with existing noise levels.

In the early 1980's the Airport Authority conducted an Airport Noise Compatibility and Land Use Study ("ANCLUC"). (TR. 209.) The purpose of the ANCLUC study was to officially determine whether uses of land near the Airport were compatible with noise levels generated from the Airport. The ANCLUC study also included an update of the Airport Master Plan originally adopted in 1975. (TR. 209, 210, 211, 850, 851 and 852.) The study was intended to be a planning document whereby the Airport Authority could provide for orderly, continued development of the Airport. (TR. 211 and 212.) The ANCLUC study identified certain land use areas near the Airport which were incompatible with Airport-related noise. (TR. 853 and 854.) As a condition to receipt of federal funds for Air-

port expansion, it was required that the identified, incompatible land use areas be made compatible with the Airport. (TR. 209 and 210.) The ANCLUC study recommended that residential use areas be made compatible by modifying the existing land use to uses which are compatible with Airport noise levels, such as light industrial and commercial uses. (DX 5, TR. 391, 392, 467 and 468.)

The Airport Authority commenced the process of acquisition of the Oxley Property.

In June, 1982, based upon a preliminary draft of the ANCLUC Study, the Airport Authority authorized acquisition of certain residential properties near the Airport, including the Oxley Property. (TR. 367, 368, 371 and 372, PX 32.) The recommended acquisition of the Oxley property was based solely on the fact that residential use was incompatible with the Airport; acquisition was not based on any Airport need for the property. (TR. 344, 345, 491, 537 and 570.) In September, 1982, the Airport Authority informed Oxley that it would begin appraisal of his property for purposes of determining the fair market value of the property, and that an offer to acquire his property would be forthcoming. (DX 6, PX 40.) In January, 1983 the Airport Authority offered to purchase Oxley's property for $1,500,000.00. (PX 33.) Oxley did not just reject the offer, he responded that his land was "not for sale." This position was surprisingly contrary to the one that he had repeatedly taken in the 1960's and 1970's. (TR. 182, DX 2.)

Oxley moved to develop his property and had it rezoned for light industrial and commercial uses, which were compatible with Airport-related noise levels.

The reason for the dramatic change in Oxley's position with respect to sale of his property was that he had made a deci-

sion to develop his property for light industrial and commercial purposes. (TR. 182, 183, 193 and 194.) It was at this time that the Airport Authority learned that Oxley was seeking to rezone his 60 acres from an agricultural classification to a light industrial/commercial classification. (TR. 513.)

In March, 1983 Oxley's attorney informed the Airport Authority that Oxley and an on-airport operator named Jandebeur were contemplating industrial/commercial development of the 60 acres that would involve Airport-related activities. The Airport Authority was informed that Oxley and Jandebeur desired to construct an access ramp to the Airport runways and taxiways that would tie Oxley's property into the Airport. (TR. 346, 347, DX 3 and PX 30.) Since the access ramp would pass through the perimeter/security fence that surrounds the Airport, the operation was referred to as a "through-the-fence operation." (TR. 479.) Oxley's attorney requested a description of the conditions for access through the fence and for use of Airport facilities, including taxiways and runways. (TR. 347 and 349.) The Airports Director responded in a letter by presenting a general outline of the terms that would be included in any through-the-fence agreement. The Airports Director qualified that any such operation would be subject to negotiation with the Airport Authority. The Airports Director invited Oxley to contact him for any further information. (TR. 348, 349, 350-351 and 352; PX 31.) Jandebeur thought the terms of the letter were reasonable; as a businessman, he knew that the through-the-fence agreement would be subject to further negotiation with the Airport Authority. (TR. 633, 634 and 636.)

After receipt of the letter, Oxley expressed no objection to the preliminary outline of terms set out by the Airports Director. (TR. 190, 423, 424, 472 and 583.) However, at trial, Oxley complained that certain terms set out in the letter were unrea-

sonable. He stated that, as part of the contemplated through-the-fence agreement, the Airport Authority wanted to charge as high as 85% of his gross revenues. (TR. 192.) But, under cross examination, Oxley admitted that no such percentage figure was stated in the letter, or in any other communication, written or verbal, from the Airport Authority, but that this exorbitant figure had been given to him by his attorney. (TR. 198.) Furthermore, Oxley admitted that all the terms set out by the Airports Director were reasonable. The position of the Airport Authority was simple: For use of Airport facilities, Oxley would have to pay the same rate charged other users. (TR. 437 and 530.)

After the exchange of letters by Oxley's attorney and the Airports Director, the Airport Authority met in July, 1983. In the meeting the final version of the ANCLUC Study was adopted. (TR. 313 and PX 11.) At that time, since no further communication had been received from Oxley regarding development of his property, the Airport Authority, based upon the noise compatibility recommendations of the ANCLUC Study, voted to move forward on acquisition of certain properties, including the Oxley Property. (TR. 423, 424, 472, 583 and PX 11.) After the July, 1983 meeting of the Airport Authority, Oxley proceeded with rezoning his 60 acres from an agricultural classification to a light industrial classification. In November or December, 1983, more than five months after receipt of the Airports Director's letter, and more than four months after the July meeting, the zoning process was completed and Oxley's attorney secured the new industrial zoning classification. (TR. 472, 473 and 577.)

The Airport Authority decided not to condemn the Oxley Property.

Based on the new industrial zoning classification and the expressed intended use of the property for commercial/industrial purposes, the Airport Authority did not proceed with acquisition of the property by condemnation. (TR. 313, 406, 407, 408, 577, 578, 579, 581 and 582.) Unfortunately the development deal with Jandebeur fell through. Due to a recession in the Oklahoma economy, Jandebeur became cautious and the option to develop Oxley's property was never exercised. (TR. 634, 635 and 636.)

Oxley sued the City of Tulsa for inverse condemnation.

On February 14, 1984, Oxley decided to obtain the full light industrial/commercial value of his property by other means—by filing the present lawsuit. In the action below, Oxley sought to prove that the entirety of his fee simple ownership in the 60 acre tract of land had been taken by virtue of Airport operations on February 14, 1984. Oxley sought to obtain the full value of the property for its highest and best use; he did not seek compensation based on the less valuable residential use, a use which had not been practical for years. (TR. Petition and Amended Petition.)

Oxley based his inverse condemnation action on three different sets of facts. The primary basis was that Airport noise levels interfered with use of the property for residential purposes. (TR. Petition and Amended Petition.) Second, Oxley alleged that the Airport intended to take his property, as demonstrated by the ANCLUC study and a subsequent acquisition offer. Oxley contended that these activities constituted an implementation of the recommendations of the ANCLUC study and Master Plan Update and, as such, were unequivocal acts to

take his property which precluded his development of the property for its highest and best use for light industrial/commercial purposes (even though Oxley testified at trial he was not even aware of the studies until after filing of the lawsuit). (TR. 147 and 148.) Finally, the lawsuit was based on a third contention that the letter written by the Airports Director on June 1, 1983, constituted a denial of access to the Airport taxiways and runways. (The testimony at trial was uncontroverted that Oxley had never been denied access.) (TR. 204, 531, 582-583.)

Pretrial Proceedings.

At pretrial the trial court determined that the trial would be divided into two phases, with the first phase on the issue of *de facto* taking and the second phase on the issue of the extent of the taking. The trial court sustained the City of Tulsa's motion *in limine*, ruling that evidence as to Master Plan implementation and alleged denial of access did not constitute a legal basis for *de facto* taking. (TR. 37, 39, 40 and 43.)

Oxley acquiesced to the court's stated trial procedure. He made no objection to the court's ruling. (TR. 55, 56, 57 and 94.) During the trial, Oxley did not make any formal offers of proof regarding the evidence objected to in the motion *in limine*. (TR. 131 and 132.) Finally, Oxley did not object to the trial court's charge and instructions to the jury which limited the question of taking to whether noise, odors and vibrations had substantially interfered with use of the Oxley property. (TR. 892-901.)

Trial.

At trial on March 23-April 3, 1986, the City of Tulsa did not dispute that residential use of the Oxley Property was not suitable on the alleged date of taking, February 14, 1984. (TR. 82.) In fact, the City of Tulsa agreed with Oxley that, even though he still received substantial rental income from the prop-

erty (DX 1), residential use of the 60 acres had been impractical and unsuitable since the 1960's or even earlier. (TR. 792, 812-813, 831-832, 834-835.) The City's position was that the 60 acres was increasingly valuable to Oxley as owner of the property. (TR. 800, 815, 816 and 887.) Due to its location, the property was ideal for light industrial and commercial development; the land was the closest and largest privately-owned tract near the Airport, one of the largest and most profitable commercial complexes in the State of Oklahoma; the property was fronted by a four-lane highway and was close to major freeway systems. (TR. 800, 815-816, 862, 863, 887, 443, 446.) Furthermore, the City proved through competent evidence that Oxley retained substantial and increasingly valuable ownership interests in the land such as title, possession, access, and rights of development, encumbrance, sale and lease of the property. (TR. 160, 161, 820, 821, 824 and 825.) Finally, there was substantial evidence at trial that the highest and best use of the property—light industrial/commercial purposes—was compatible with the Airport and the noise levels generated therefrom. (TR. 474, 577, 578, 793 and 794; *also see* pp. A34-A35 of petition for writ of certiorari.)

Oxley sought to prove that, even though the property was suitable for light industrial/commercial development, the Master Plan and ANCLUC study for the Airport interfered with his development of the property for those purposes. (TR. Petition and Amended Petition, 148.) However, in cross examination, Oxley admitted he was not even aware of these studies until his attorney told him about them after the lawsuit began (after the taking of Oxley's deposition in which he said the property was suitable for such development.) (TR. 148). At trial it was established that adoption and implementation of a Master Plan restricting certain uses in noise sensitive areas

would have no adverse effect on the types of light industrial/commercial development to which the property was best suited. (TR. 408 and 409.)

SUMMARY OF ARGUMENT

The test of whether a governmental taking of private property has occurred within the meaning of the Oklahoma Constitution involves a factual determination of whether there has been substantial interference with the landowner's use and enjoyment of his property. The question of whether there has been "substantial interference" is a question for the trier of fact.

In this case the landowner claims a *de facto* taking of his fee simple interest in property adjacent to an airport due to three causes: (1) adverse airport conditions (airport noise, fumes, vibrations and overflights), (2) denial of his access to the airport, and (3) adoption of a Master Plan and noise study by the City of Tulsa which he claimed had the effect of prohibiting all viable use of his land.

The landowner presented all of his evidence to a jury. The jury returned a verdict that, as a matter of fact, there had been no substantial interference by the City of Tulsa with his use and enjoyment of the fee simple interest in his land. Thus, his property had not been "taken." On appeal the Oklahoma Supreme Court affirmed the trial court.

The evidence was uncontroverted at trial that the highest and best use of the land is for industrial/commercial purposes. The "adverse airport conditions" did not hinder the use of the land for industrial/commercial purposes. The allegations of denial of access and regulatory limitations purportedly imposed on the landowner were without factual support on the record.

ARGUMENT

Oxley asserts two reasons that certiorari should be granted:

1. The jury should have found that a taking occurred under OKLA. CONST. art. II, § 24, since adverse airport conditions (noise, overflights, etc.) coupled with an alleged denial of access to the Airport constituted a substantial interference by the City of Tulsa with Oxley's use and enjoyment of his property; and

2. The jury should have found that a taking occurred since the City of Tulsa's adoption of a Master Plan and acceptance of a noise study precluded Oxley from all economically feasible uses of his property.

RESPONSE TO PROPOSITION 1

In his first proposition, Oxley essentially argues that the jury should have found that the fee simple interest in his property was taken by inverse condemnation under the Oklahoma Constitution since airport conditions (noise, fumes, vibrations and overflights) coupled with an alleged "denial of access" to the Airport constituted a substantial interference with the use and enjoyment of his property:

> [T]he combined effects of airport conditions and anti-competitive conduct were properly before the jury for its decision as to whether there had been a substantial interference with a protected property interest . . . [T]he unbearable living conditions generated by airport operations appropriated an avigation easement by virtue of their immediate interference with a protected property interest [satisfying the "immediate interference" test of *U.S. v. Causby* and *Griggs v. Allegheny County*, and]; . . . [T]he anti-competitive regulation of the property . . . effectively precluded all use of the property . . . Petition for writ of certiorari at 16, 17.

The standard for a "taking" by eminent domain under the Oklahoma Constitution is less restrictive than the "taking" standard under the United States Constitution.

Under the Oklahoma Constitution "[p]rivate property shall not be taken or *damaged* for public use without just compensation." OKLA. CONST. art. II, §24 (Emphasis added.) The test for a taking is "whether there is sufficient interference with the landowner's use and enjoyment to constitute a taking." *Henthorn v. City of Oklahoma City*, 453 P.2d 1013, 1015 (Okla. 1969). Whether there has been "substantial interference" is for the trier of fact. *Henthorn*, 453 P.2d at 1016.

Under the United States Constitution, there must be an actual deprivation of all rights in and to the property in order to constitute a compensable taking of a fee simple interest. "Damage" to property does not result in a fee simple taking. U.S. CONST. amend. V, amend. XIV. *See e.g., United States v. Causby*, 328 U.S. 256 (1946).

In the case below, Oxley urged a "taking" under both the Oklahoma Constitution and the United States Constitution. By alleging the Oklahoma constitutional standard, the jury was permitted to find that a *de facto* taking of the property had occurred by substantial interference with the use and the enjoyment of the property—nothing more was required.

It should be noted that Oxley alleged a *fee simple* taking. Footnote 4 of the Oklahoma Supreme Court's opinion precisely addresses why Oxley is wrong in his complaint of a *de facto* taking by reason of interference with residential use only. A landowner alleging inverse condemnation must "prove a significant impairment of the fee estate of the property rather than impairment of a single use, i.e.: residential." But Oxley "*voluntarily and with full knowledge regarding the airport's intentions* and

the reasons for those intentions elected to have his property rezoned to a compatible use. Oklahoma and other jurisdictions have recognized the doctrine of 'estoppel by acquiescense.' " Opinion of Oklahoma Supreme Court below at A-7 of petition for writ of certiorari, n. 4; Emphasis in original. In accordance with Oklahoma Constitutional law (*see Henthorn v. Oklahoma City*, 453 P.2d 1013 (Okla. 1969)), the question put to the jury was whether there was sufficient interference with the landowner's use and enjoyment to constitute a taking. The jury was instructed, without objection from Oxley, that there must be a substantial interference with the use and enjoyment of one's property in order to constitute a *de facto* taking.

As to the denial of access contention of the first proposition, Oxley did not present any evidence:

> "[Oxley's] assertions that the airport imposed unreasonable restrictions on through the fence operations and engaged in other "discriminatory" and "anti-competitive" practices, are all without factual support in this record." Oklahoma Supreme Court Opinion, at page A-9 of petition writ for certiorari.

Using the broader Oklahoma constitutional standard, the jury, after considering all of Oxley's complaints of adverse airport conditions and Oxley's factually unsupported assertion that he had been denied access to the Airport, concluded that, as a matter of fact, there had been no substantial interference with the use and enjoyment of Oxley's property. Hence, there was no "taking."

A jury verdict based upon jury instructions correctly stating the applicable constitutional standards has been rendered. That verdict is supported by the evidence and the law. There are no special or important reasons for granting certiorari; there is simply no federal question presented.

RESPONSE TO PROPOSITION 2.

In his second proposition, Oxley argues that the jury should have found that his property was taken by inverse condemnation since the City of Tulsa adopted a Master Plan and accepted a noise study, which together precluded Oxley from all economically feasible use of his property.

In his second proposition, Oxley appears to urge that the terms of the Master Plan and the noise study result in regulations which prohibit all use of Oxley's property thus resulting in a compensable "taking" of his property:

> The implementation of the Master Plan and ANCLUC policy recommendations and the irrevocable commitment to the expansion of the airport are the unequivocal and overt acts which have caused an immediate and substantial interference with protected property rights which, in turn, lead to the effective exercise of dominion and control over the land which precludes all reasonable use thereof. Petition for writ of certiorari at 21.

However, the Oklahoma Supreme Court considered the Airport Authority's actions, including implementation of the Master Plan and the noise study, and held that all allegations as to "discriminatory" and "anti-competitive" practices, were simply "without factual support in this record." Opinion of Oklahoma Supreme Court, at A-9 of petition for writ of certiorari. Thus, the Oklahoma Supreme Court was compelled to affirm the jury's verdict that, as a matter of fact, there had been no substantial interference with the use and enjoyment of Oxley's property by reason of the Master Plan implementation, the noise study adoption, or any other facts. Furthermore, in the trial record, there is *no evidence* that any regulation resulted in an "overt act leading to exercise of dominion and control

over [the] property upon which to base a de facto taking." *State ex. rel. Department of Highways v. Cook*, 542 P.2d 1405, 1407 (Okla. 1975). *Also see* opinion of Oklahoma Supreme Court at page A8 of petition for writ of certiorari. Once again, a jury verdict which was based upon jury instructions correctly stating the applicable constitutional standards, has been rendered. The jury verdict is supported by the evidence and the law. There are no special or important reasons for granting certiorari. There is no federal question presented.

CONCLUSION

For the reasons set forth above, the respondent submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

J. RICHARD STUDENNY & ASSOC.
J. Richard Studenny

1924 South Utica, Suite 1200
Tulsa, OK 74104
(918) 747-3611

Counsel for Respondent

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